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Supreme Court, U.S.
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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

BEN TOM JONES,

Petitioner,

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

On Petition for Writ of Certiorari to the Appellate Court Of Illinois For The Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ben Tom Jones respectfully prays that a writ of certiorari issue to review the decision of the Appellate Court of Illinois for the Second Judicial Circuit in the above-captioned cause.

QUESTIONS PRESENTED

1. Where a trial judge has found, as an ultimate fact on a motion for new trial after a jury verdict, that a defendant in a criminal case has not knowingly and intelligently waived his right to have counsel present at a police interrogation preliminary to the charging of an offense and that therefore his confession made during that interrogation was erroneously admitted in evidence, is a state reviewing court precluded by Article VI, Clause 2, of the United States Constitution from determining that the trial judge's factual determination was "against the manifest weight of the evidence"?

2. Does a statement by police officers during the interrogation of a suspect upon whom the investigation has focused that the suspect is entitled to counsel at a future date, satisfy the requirements of the 5th, 6th and 14th Amendments to the

Constitution of the United States, as declared by this Court in Miranda?

STATEMENT AS TO PARTIES

The names of the parties to this cause are stated in the caption herein.

TABLE OF CONTENTS

Prayer for issuance of writ.....1

Questions Presented.....2

Statement as to Parties.....3

Reports of Decisions Below.....6

Jurisdiction of this Court.....7

Constitutional Provisions Involved.....8

Statement of the Case.....9

Presentation of Issues in Courts Below..19

Argument.....20

I THE APPELLATE COURT IS PROHIBITED BY THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION FROM DECIDING A FACTUAL ISSUE WHICH IS GERMANE TO A QUESTION OF FEDERAL RIGHT IN A MANNER WHICH DIFFERS FROM THE TRIAL JUDGE'S DETERMINATION OF THE ISSUE..... 22

II ADVISNG A SUSPECT DURING A CRIMINAL INTERROGATION BY POLICE OFFICERS THAT HE HAS A RIGHT TO COUNSEL AT A LATER DATE IS NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE 5TH AND 14TH AMENDMENTS AS INTERPRETED IN MIRANDA.....30

Conclusion.....35

Appendix.....1a

Trial Court Order.....1a

Proceedings of April 29, 1983.....3a

Appellate Court Opinion.....23a

Order denying leave to appeal.....49a

Affidavits.....50a

TABLE OF AUTHORITIES

Cases:

Bowman v. Illinois Central R. Co., 11 Ill. 2d 186, 142 N.E. 2d 104 (1957) cert. den. 355 U.S. 837.....26

Brown v. Western Rwy of Alabama, 338 U.S. 294 (1949).....26

Central of Georgia v. Wright, 207 U.S. (127) (1907).....28

Dice v. Akron & Youngstown R. Co., 342 U.S. 359 (1951).....23

Durham v. United States,
401 U.S. 481 (1971).....8

Edwards v. Arizona,
451 U.S. 477 (1981).....32,34

Garrett v. Moore-McCormack Lines,
317 U.S. 239 (1940).....24

Gilpin v. United States,
415 F. 2d 638 (C.A. 5th, 1969).....32

Jackson v. Denno,
378 U.S. 368 (1964).....29

Keely v. Moore, 196 U.S. 38 (1904).....28

Lathers v. United States,
396 F. 2d 524 (C.A. 5th, 1968).....32

Lavender v. Kurn, 327 U.S. 645
(1946).....24

Miranda v. Arizona, 384 U.S.
436 (1966).....3,31,32,34

North Carolina v. Butler,
441 U.S. 369 (1978).....34

People v. Jones, 129 Ill. App.
3d 618, 84 Ill. Dec. 780, 472
N.E. 2d 1176 (1984).....6

Sims v. Georgia, 385 U.S. 538
(1966).....29,33

Sullivan v. United States,
389 F. 2d 985 (C.A. 10th, 1968).....32

Taglianetti v. United States,
394 U.S. 316 (1969).....8

United States v. Garcia,
431 F. 2d 234 (C.A. 9th, 1970).....33

United States ex rel. Williams
v. Twomey, 467 F. 2d 1248 (C.A.
7th, 1972).....32

U.S. Constitutional Provisions:

Article VI, Clause 2.....23,29

5th Amendment.....2,21

6th Amendment.....2,21

14th Amendment.....2,21

Statutes:

28 U.S. Code Sec. 1257.....8

Rules:

U.S. Supreme Court, Rule 20.....8

DECISIONS BELOW

The opinion of the trial judge suppressing the petitioner's statement and granting a new trial is unreported but it is reproduced at page 1a of the Appendix. The Appellate Court opinion, reported at 129 Ill. App. 3d 618, 472 N.E. 2d 1176, 84 Ill. Dec. 780, is reproduced at page 23a of the Appendix. The order of the

Supreme Court of Illinois denying leave to appeal is unreported, but a copy of the notice thereof is reproduced at page 49a of the Appendix.

JURISDICTION OF THIS COURT

The sentence of the trial court, entered on a verdict of guilty by the jury, and the order vacating that sentence, suppressing the petitioner's statement and granting the petitioner a new trial was entered on April 29, 1983 (App. 1a). The respondent appealed from that order to the Appellate Court of Illinois for the Second Judicial District which reversed and remanded with directions on December 20, 1984. Petitioner thereupon filed a petition for leave to appeal to the Supreme Court of Illinois which was denied on April 2, 1985 (App. 49a). With the denial of leave to appeal, the judgment of the Appellate Court became the decision of the high-

est court in the state system in which review might be sought. The jurisdiction of this Court is invoked pursuant to 28 U.S. Code Sec. 1257.

Although this petition does not comply with the time limit prescribed in Rule 20 of this Court, such failure is not jurisdictional and this Court, in its discretion, may consider this petition on its merits, Durham v. United States, 401 U.S. 481 (1971) and Taglianetti v. United States, 394 U.S. 316 (1969). The reasons for the delay in filing are set forth in the affidavit included in the Appendix to this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution:

Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof.... shall be the supreme law of the land; and the Judges in every State shall be bound there-

by, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 5:

"No person shall be...deprived of life, liberty or property without due process of law..."

Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right ...to have the Assistance of Counsel for his defence."

Amendment 14:

"Section 1. ....nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF FACTS

A DuPage County Sheriff's office detective, Vosburgh, telephoned petitioner's father, requesting him to bring petitioner in for questioning by Vosburgh concerning a "Woodridge" robbery. At the agreed time, petitioner and his father appeared. Vosburgh proceeded to question petitioner for about 40 minutes about the

"Woodridge" robbery. Vosburgh decided that petitioner was not involved in the "Woodridge" robbery. He then told petitioner that there were two other gentlemen who wanted to talk to petitioner, introducing Detective Hogberg from the Elmhurst's Police Department and Detective Romani from the Oak Brook Police Department. Hogberg and Romani proceeded to interrogate petitioner about the offense charged in the instant indictment, the interrogation resulting in a confession which was admitted in evidence. No stenographic or other verbatim recording was made of the interrogation, and no signed, written waiver was obtained from petitioner. (The evidence concerning the events which took place during the interrogation is conflicting and will therefore be narrated by witness and by stage of the proceedings).

HEARING ON MOTION TO SUPPRESS

Hogberg:

Detective Hogberg testified that he admonished the petitioner concerning his rights, including his right to counsel, from memory since he did not have his "card" with him. He testified that, relative to petitioner's right to counsel, he told petitioner (Tr. 66):

> "...and the fact that if he couldn't afford an attorney, one would be appointed for him by the Court, but, you know, that there won't be any appointed tonight. That would be at a later date if he (petitioner) was ever charged with anything" (emphasis supplied).

Hogberg claimed that after each statement was made to petitioner concerning his rights, petitioner would either nod his head or say that he understood (Rec. 65). Hogberg said that petitioner did not refuse to answer questions without a lawyer, and that defendant did not indicate that he might want a lawyer until

after he had confessed (Rec. 68). On cross examination, Hogberg confirmed the fact that he did not advise petitioner that he had a right to an attorney at the particular interrogation being conducted, saying by way of exculpation that this was "Not in the Miranda!" (Rec. 151).

Romani:

Romani differed from Hogberg in several particulars. He claimed that Hogberg read the warning from a card, and that Hogberg advised petitioner that he was entitled to have an attorney present at the ensuing interrogation (Rec. 182); he also testified that defendant acknowledged that he understood his rights (Rec. 182). He further claimed that although petitioner's father asked about the advisability of counsel during the questioning, it was only after the petitioner had made inculpatory statements that his father indicated that he was going to obtain

counsel for the petitioner (Rec. 183-6). Romani also testified that he would not have let petitioner leave the Sheriff's Office at any time (Rec. 224).

Ben Jones:

The petitioner's father testified that neither Hogberg nor Romani advised petitioner of his rights, and claimed that, right after Hogberg and Romani introduced themselves, petitioner told the detectives that "they", petitioner and his father, were not answering any questions, and that he wanted a lawyer (Rec. 31).

Ruling on Motion:

Following Illinois criminal procedure, petitioner moved to suppress his confession which had been obtained during that investigation. The court denied this motion, admitting the confession into evidence during the trial, although admitting, in so doing, that Hogberg's testimony as

to having advised petitioner of his right to have counsel present at that particular interrogation could have been misleading, and that the trial court was also troubled by Hogberg's inability to recall many of the details (293-296).

TESTIMONY AT TRIAL

At trial, Hogberg again testified that he advised petitioner of his rights from memory, and that petitioner nodded or stated that he understood each right after it was recited (REc. 469). On cross examination, he vaguely remembered telling petitioner that he did not have a right to have an attorney present at the ensuing interrogation and that he recalled saying, at the hearing on petitioner's Motion to Suppress, that that was not in the Miranda warnings. He admitted that he did not advise petitioner that he could stop answering questions until an attorney was present (Rec. 493-6). He said, "it isn't on my

card that I recall" (Rec. 497).

Romani:

On direct examination, Romani testified that he heard Hogberg read the Miranda warnings, and that petitioner indicated that he understood them(Rec. 511-12). On cross examination, however, he testified that petitioner only acknowledged that he understood his rights at the conclusion and not at the end of each question. He did not recall that Hogberg told petitioner that he could have an attorney present at the interrogation or that he could stop answering questions at any time until an attorney was present (Rec. 533-5).

Romani admitted that petitioner was not free to leave during the interrogation (Rec. 537-8).

Ben Jones:

Mr. Jones testified that both he and petitioner told Hogberg and Romani that they wanted a lawyer present during the

questioning of petitioner (Rec. 576-7). He didn't hear Hogberg tell petitioner that he had a right to remain silent, that he had a right to have an attorney present, and that he did not have to answer questions unless an attorney was present (Rec. 576-9).

Defendant was tried for armed robbery. His confession, obtained during the Hogbert - Romani interrogation, was admitted in evidence. The jury returned a verdict of "guilty".

Post Trial Proceedings:

After sentencing petitioner to a term of 6 years and 180 days (App. 4a), the trial judge, on post trial motion, vacated the order denying petitioner's motion to suppress his confession, vacated the judgment and sentence, suppressed the confession and ordered a new trial (App. 2a). In so holding, the trial judge pointed out

that, at the conclusion of the pre-trial hearing on the motion to suppress, she concluded that the evidence supporting the voluntary nature of the confession was minimal but that the State had met its burden (App. 8a-9a). During the trial she heard additional testimony in which there was further conflict (App. 9a). After reviewing her impressions of the evidence in toto, she concluded (App. 11a):

> "There were further discrepancies, and I am left with the view, considering the whole picture, as I believe I have a right tc do at this time, that I really do not believe that the State sustained the burden of proving that this defendant knowingly and understandingly and intelligently waived his right to have counsel present at that time."

The Appellate Court:

At the start of its opinion, the reviewing court states that the issue is "whether the trial court's determination that defendant had not knowingly and intelligently waived his right to counsel

during a police interview was against the manifest weight of the evidence" (emphasis supplied) (App. 24a).

After reviewing Illinois, rather than Federal, decisions and focusing on Detective Romani's testimony, despite the fact that Detective Hogberg supposedly, gave, or did not give, the requisite warnings, the Appellate Court concludes (App. 39a):

> "We do not find consideration of Romani's trial testimony warranted the trial court's ultimate suppression of the confession on the specific basis that defendant did not make a knowing and intelligent waiver of his right to counsel, and the finding was against the manifest weight of the evidence" (emphasis supplied).

After concluding that the alleged waiver in connection with the interrogation by Vosburgh was sufficient to carry over into the interrogation by Hogberg and Romani concerning an entirely different offense (App. 45a), the reviewing court

returns to its manifest weight of the evidence theme, reiterating the conclusion that the trial court's order granting the new trial and suppressing the confession was manifestly erroneous (46a).

PRESENTATION OF ISSUES IN COURTS BELOW

The initial issue was whether petitioner had knowingly and voluntarily waived his right to have counsel present during his interrogation by Hogberg and Romani. This question was raised by the pre-trial motion to suppress the confession in accordance with Illinois law (Rec. 291). It was renewed in connection with petitioner's post trial motion, furnishing the grounds for the granting of that motion based on a finding of fact that petitioner had not knowingly and intelligently waived his right to counsel (App. 1a-22a). The right of a reviewing court to reverse a trial judge's finding as to waiver of a Federal

constitutional right injected itself into the case with the Appellate Court's selection of that ground as the basis for its decision, although petitioner had contended that, under the Federal decisions cited, such was not the case. The violation of petitioner's federally guaranteed constitutional rights was the basis for his petition for leave to appeal to the Supreme Court of Illinois (Ptn., p. 2).

ARGUMENT

The trial judge predicated her ruling on the post trial motion and her suppression of petitioner's confession on a factual determination that it was made during an interrogation at which petitioner had not knowingly and intelligently waived his right to have counsel present before the interrogation proceeded. This, of course, amounts to a deprivation of petitioner's rights to due process and the assistance of counsel in his defense under

the 5th and 6th Amendments to the United States Constitution, which are applicable to state court proceedings by virtue of the 14th Amendment. Thus, the issue is one of Federally created rights, and, in determining whether those rights have been infringed, a state reviewing court is obliged to follow the Federal, rather than the state, rules, with respect to the scope of that review. Under the Federal system, a reviewing court may not pass upon the weight of the evidence and reach a result in conflict with that reached by the trial court. Thus the Illinois Appellate Court is guilty of plain error, manifest on the face of its opinion.

Moreover, in determining the validity of the warnings which underlie the waiver, the state courts are bound to follow Federal, rather than state, decisions. The record here is clear that petitioner, who

was then under confinement, was not informed that, if he so elected, he could terminate the interrogation until counsel was present to represent him. The Federal decisions indicate that this is an integral part of the requisite warnings to render a waiver knowing and intelligent.

I

THE APPELLATE COURT WAS PROHIBITED BY THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION FROM DECIDING A FACTUAL ISSUE WHICH IS GERMANE TO A QUESTION OF FEDERAL RIGHT IN A MANNER WHICH DIFFERS FROM THE TRIAL JUDGE'S DETERMINATION OF THE ISSUE.

As pointed out in the Statement of Facts, the Appellate Court, in its opinion, decided that the trial judge's conclusion that petitioner did not knowingly and intelligently waive his right to counsel during the interrogation by Hogberg and Romani was against the manifest weight of the evidence. In reaching the conclusion that this fact, if correct, permits it to re-

verse, the Appellate Court applies Illinois, not Federal law governing the scope of review.

Where, as here, Federal rights are involved, state courts are bound, both as a matter of supremacy, under Article VI, Clause 2, of the Constitution of the United States, and as a matter of policy, in the interest of uniformity, to follow the Federal rules for determining those rights. In Dice v. Akron & Youngstown R. Co., 342 U.S. 359 (1951), this Court held that the validity of a release of a cause of action under the Federal Employers' Liability Act was to be determined by Federal, rather than State, law. At page 361 of the official reporter, this Court said:

> "Congress in Section 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controling in determining what the incidents of this federal right shall be....

> Manifestly, the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."

(See also: Garret v. Moore-McCormack Lines, 317 U.S. 239 (1940) for a similar declaration of policy). If this policy requires uniformity, and the complete following of Federal precedents, in cases involving money damages, how much more compelling is it in cases where constitutionally protected rights affecting personal liberty are concerned?

This principle has been held to require state courts to follow the Federal rule as to the scope of review in enforcing Federally created, or protected, rights. In Lavender v. Kurn, 327 U.S. 645 (1946),

a verdict and judgment in favor of the plaintiff were reversed by the Missouri Supreme Court as being against the weight of the evidence, that court holding that there was no substantial evidence of negligence. This Court, having granted certiorari apparently for the purpose of declaring that in matters of Federal right, state reviewing courts were required to follow the Federal rule delimiting the scope of review of factual issues, held that there was enough evidence to warrant submitting the case to the jury, and that the reviewing court was required to abide by the jury's determination of questions of fact (See: opinion, page 651). At page 653 of the official reports, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts

> are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Lavender opinion cited a number of other authorities for this proposition, including Tiller, Bailey and Tennant, with respect to the scope of review with respect to Federal rights. Implicit in this Court's holding that it is not bound by a state court's rules for construing pleadings where a Federal question is involved, Brown v. Western Rwy of Alabama, 338 U.S. 294 (1949), is a holding that this principle applies to what might otherwise be called "procedural" rules with respect to the review of an issue involving a Federal right.

Even the Supreme Court of Illinois has clearly recognized this principle, Bowman v. Illinois Central R. Co., 11

Ill. 2d 186, 142 N.E. 2d 104 (1957) cert. den. 355 U.S. 837. There, an Illinois Appellate Court had reversed and remanded a verdict and judgment for a plaintiff in an FELA case as being against the manifest weight of the evidence. The Illinois Supreme Court reversed, holding that, in the case of a Federal right, a reviewing court could not weigh the evidence. The court said, at page 114 of the Northeastern Reporter:

> "If jury verdicts could be set aside according to local standards and rules of procedure in appellate courts, whereby the evidence is reweighed, as was done in the instant case, then the right to jury trial may be rendered impotent and lose its significance. Consequently, in accordance with the mandate in the Dice case, we are bound by the determination of the United States Supreme Court as to the province of the jury in such cases."

But it may be argued in opposition that what is under consideration here is a determination by a trial judge on a post

trial motion rather than a jury verdict. The answer to that is that the determination of the trial judge in granting or denying a motion for new trial, because of the weight of the evidence is final and not reviewable as to errors of fact on appeal, Central of Georgia v. Wright, 207 U.S. 127 (1907) and Keely v. Moore, 196 U.S. 38 (1904). Here, the trial judge determined that the weight of the evidence precluded the admission of the petitioner's confession. Since the confession had been heard by the jury, the verdict was against the manifest weight of the competent evidence, and, therefore, a new trial should be granted. The Appellate Court, by its own admission, did not find an error of law. It reversed for a claimed error of fact. This invades the province of the trial judge in passing on a motion for new trial under the Federal standards as declared by this Court.

To permit this decision to stand would directly conflict with the rationale of Sims v. Georgia, 385 U.S. 538 (1966). In that case, the issue was whether the Federal requirements for the admissibility of a confession had been complied with although the State procedural requirements had been followed. This is an issue involving the identical constitutional provisions to those involved here. At page 544, this Court holds that the Supremacy Clause of the Federal Constitution (Article VI, Clause 2) requires that Federal, rather than state, rules must be followed in determining whether the admission in evidence of the confession violated the petitioner's constitutional rights. This, of course, includes the Federal rule on the scope of the issues on appeal. [See Also: Jackson v. Denno, 378 U.S. 368 (1964)].

The decision below clearly determines the limits of petitioner's Federal constitutional rights. In doing so, it should act within the Federal limitations, on judicial review. Otherwise, the scope of a criminal defendant's constitutional rights will depend on whether his case is tried in a jurisdiction which follows the Federal limitation as its standard for the review of factual determinations or in a jurisdiction where review of the weight of the evidence is permitted on appeal. This, manifestly, contravenes the policy which mandates uniformity in the enforcement of Federal rights.

II

ADVISING A SUSPECT DURING A CRIMINAL INTERROGATION BY POLICE OFFICERS THAT HE HAS A RIGHT TO COUNSEL AT A LATER DATE IS NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AS INTERPRETED IN MIRANDA.

Hogberg, during the interrogation at which the confession was obtained, clearly

told petitioner that counsel would not be available to him at the interrogation. He clearly did not tell petitioner that he was not required to continue to answer Hogberg's and Romani's questions without counsel representing him being present. By Romani's own admission, petitioner was not free to leave the Sheriff's office. This contravenes the plain language of this Court in Miranda v. Arizona 384 U.S. 436 (1966), at page 479 where this Court said:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" (emphasis ours).

Elsewhere, this court, in the Miranda opinion, stated that an individual held for interrogation must be "clearly informed" of his right to have counsel present at

the interrogation if he so desires, Even more explicit on this point is this Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981) where this Court pointed out, at page 474, that although the authorities may detain a suspect for a reasonable amount of time without providing counsel if they do not question him during that time, without counsel.

The direct positive evidence is that Hogberg limited his statement of petioner's right to counsel to a future time and another place. The Federal decision, based on Miranda, uniformly hold this is not sufficient: United States ex rel Williams v. Twomey, 467 F. 2d 1248 (C.A. 7th, 1972) (if and when you go to court); Sullivan v. United States, 389 F. 2d 985 (C.A. 10th 1968) (same); Lathers v. United States, 396 F. 2d 524 (C.A. 5th, 1968); Gilpin v. United States, 415 F. 2d 638

(C.A. 5th 1969), and United States v. Garcia, 431 F. 2d 234 (C.A. 9th 1970) (when you first appear before the U.S. Commissioner or the Court). The Appellate Court ignores this well established body of Federal law, contrary to the requirement of the Supremacy clause as laid down in Sims. This should not be sanctioned by this Court.

The Appellate Court does not address the issue of waiver, other than to claim that petitioner should have asserted it during his interrogation by Vosburgh (App. 42a-43a). Petitioner was advised in advance of the subject matter of Vosburgh's questioning, and, as evidenced by the fact that Vosburgh did not charge him with the "Woodridge" robbery, could well have assumed that counsel was unnecessary for questions concerning that event. He did not know that Hogberg and Romani would also be

there to question him about the Oakbrook and Elmhurst incidents (Rec. 49, 53). As a preliminary, Hogberg restated his rights to petitioner with the important difference that he told him that counsel would be available only later and did not tell him that he did not have to answer questions without counsel being present. Certainly, petitioner could reasonably have assumed, even if the Vosburgh statement of the warning would otherwise be applicable, that it was no longer effective since only Hogberg and Romani and petitioner's father were present at this questioning. Vosburgh having returned to his office. (Rec. 44-50).

This Court has held in Miranda, at page 475; in Edwards, and in North Carolina v. Butler, 441 U.S. 369, at 373 (1978), that a waiver cannot be implied from the fact that there is no affirmative asser-

tion of the right to counsel during the interrogation or from the fact that the accused may have made statements, as the Appellate Court opinion seeks to do in this case. The plain fact is that, given the confusion concerning Hogberg's statements, waiver cannot be inferred in the absence of a clear, unequivocal statement, preferably written, by petitioner.

CONCLUSION

The opinion below manifests a clear disregard of the decisions of this Court, and, if permitted to go unchallenged, will stand in opposition to the standard of uniformity which the Supremacy Clause of the Constitution and the policy laid down by this Court dictate for the protection and enforcement of Federal rights by state courts.

For the above and foregoing reasons, a writ of certiorari should issue to re-

view the decision of the Appellate Court of Illinois for the Second Judicial Circuit in this case, and, on such review, the opinion and judgment below should be reversed and the cause remanded with directions to reinstate the decision of the trial judge in its entirety. Alternatively, petitioner should have such other and different relief as to this Court may seem just in the premises.

Respectfully submitted,

_____
Catherine C. Anagnost
Attorney for petitioner

A P P E N D I X

IN THE EIGHTEENTH JUDICIAL CIRCUIT, DUPAGE COUNTY, WHEATON, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	No. 82 CF 1000-01
	)	82 CF 1000-02
-vs-	)	
BEN TOM JONES	)	

O R D E R

This cause coming on for hearing in aggravation, mitigation, sentencing and defendant's post trial motion for new trial in 82 CF 1000-01, the court having jurisdiction and being fully apprised in the premises,

IT IS HEREBY ORDERED:

On the motion of the Court, the judgment and sentence entered in this case in 82 CF 1000-01, is vacated for the reasons stated on the record.

On the Motion of the defendant, pursuant to paragraph 16 of defendant's Motion

for New Trial, the court's ruling on the pre-trial motion to suppress the defendant's statements is reversed, the statement of the defendant is now suppressed for reasons stated on the record, and the state has leave to appeal this ruling suppressing defendant's statement.

IT IS FURTHER ORDERED that this cause be and hereby is continued for further proceedings to May 26, 1983, at 10:00 A.M.

ENTER:

Helen C. Kinney

Judge

April 29, 1983

JOHN W. COCKRELL, CLERK OF THE 18TH JUDICIAL CIRCUIT COURT, WHEATON, ILLINOIS

C 445

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEEN JUDICIAL CIRCUIT OF
ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, -vs- BEN T. JONES, Defendant.	No. 82 CH 1000-01 -02

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable HELEN C. KINNEY, Judge of said Court, on Friday, the 29th day of April, A.D. 1983, at the hour of 9:00 o' clock A.M.

PRESENT:

MR. J. MICHAEL FITZSIMMONS, State's Attorney of Du Page County by

MR. WM. THOMAS FREEMAN and
MR. JOSEPH BIRKETT, Assistant State's Attorneys,
appeared on behalf of the people of the State of Illinois.

MESSRS. ANAGNOST & ANAGNOST, by
MS. CATHERINE ANAGNOST,
Appeared on behalf of the defendant.

DEFENDANT BEN T. JONES.

* * * * *

C 484

THE COURT: All Right.
It is the sentence of this Court that the

C 485

defendant is committed to the Illinois Department of Corrections to serve a term of 6 years, plus 180 days.

Now, I want to set out my thinking in that regard. As defense coun-

sel says I have no choice to impose less than the minimum of six years.

The State referred to compensation for the crime in its argument, at least in passing, and let me say that I do not consider that the proceeds of the crime itself do not qualify under this statutory guideline in aggravation.

I recognize that the defendant comes from a fine family. It seems to have been an aberration on his part, certainly nothing that would be proved by his close relatives, and I am sure that they have suffered great anguish over it.

However, I considered this. There is one prior conviction of a credit card, but I think that is of no great consequence. It is another offense.

Unfortunately, we have become accustomed to an increasing number of armed robberies. Many of them occur at isolated gas stations with one person in attendance or some sort of small delicatessen type store that is open 24 hours a day, and it has been kind of a lonely situation.

C 486

But in this case I think the really horrifying aspect of it was that it occurred in Oak Brook Center at 2:00 o'clock on a sunny afternoon, and I think that the community has a real, a really definite interest in drawing the line. That is pretty horrifying, and so that is the basis for my imposing 6 years and adding 180 days.

Now let me return to the ruling.

MS. ANAGNOST: How about the time that he did serve? Should he be given credit for the time that he had served prior to the trial?

THE COURT: How much time did he serve?

MR. FREEMAN: 21 days, your Honor.

THE COURT: Yes, he will have credit for 21 days served.

Let me return to the ruling that I had reserved, and that concerns the ruling on the motion to suppress pre-trial and then there was additional evidence about this during the trial.

I am going to enter the sentence that I have just announced, and then, I am going to proceed to vacate the sentence and to grant the defendant

a new trial based only on the single issue that I have given a great deal of thought to this issue.

C 487

There was the testimony prior to trial in the hearing on the motion to suppress. I ruled in favor of the people on that, and I think that I indicated for the record that I didn't assess credibility of the witnesses. I found I was very interested in the defendant's father's testimony. I was very interested in the testimony of Detective Romani.

Detective Hogberg's testimony was not very clear, but I want to state that I am not ruling on credibility. I basically ruled on the reasonableness of what happened. Then I heard additional testimony about the situ-

ation in the course of the trial.

At the conclusion of the pre-trial motion, it was a minimal situation. The State has the burden of proving the things that it is required to prove to overcome a motion to suppress statements, and by a preponderance of the evidence, and that's where I placed the burden of proof.

As I say, at the conclusion of the pre-trial motion, the evidence was minimal, but I felt that the State had sustained its burden.

In the course of the trial there was further testimony from Detective Hogberg concerning this issue. There was a further conflict in it, and let me say this,

C 488

The narrow ground of my ruling is not that the defendant wasn't

warned, but that I do not believe there is the requisite showing that he knowingly and intelligently waived his right to counsel. It is the single issue of my ruling.

I have received in my own mind some of the things on the pre-trial hearing, Detective Hogberg's testimony that he said something to the effect that he could have an attorney and if he didn't have the money for an attorney, one would be appointed for him, but that, of course, the attorney wouldn't be here tonight. There was something of that sort. Nevertheless Detective Romani, who testified persuasively and reasonably, but again I am not making an assessment between the credibility of the defendant's father and Detective Romani, just the reasonableness

of what happened.

I went along with Detective Romani's testimony at that time, but then came the trial, and then, came the further evidence about, was there a pause after the first right, after the second right, after the third right, and so forth.

There were further discrepancies, and I am left with the view, considering the whole picture, as I believe I have a right to do at this time, that

C 489

I really do not believe that the State sustained the burden of proving that this defendant knowingly and understandingly and intelligently waived his right to have counsel present at that time. He certainly wasn't-- Well, strike that.

One of the considerations at that time of that hearing was whether or not he was under arrest. Detective Romani testified he would not have let him leave the Sheriff's office.

Since this case was heard, the Illinois Supreme Court has issued an opinion which holds that there should be an objective standard as to whether the defendant is or isn't under arrest, is or isn't in custody, and it really doesn't go to what a particular officer may believe or may not believe.

It is my view of the objective situation that the defendant was not free to leave the Sheriff's Office that night, and I think that view is entirely consistent with my very strong view that there was plenty of probably cause, overwhelming

probable cause, to bring him in and inquire into this matter, and that's the way the defendant's motion started out, that there was--that it was an illegal detention. There was no probable cause to even ask him to come to the Sheriff's Office.

C 490

That was the theory of the case, People versus Townes, that Mrs. Anagnost cites.

I haven't changed my view on that whatsoever. There was lots of probably cause, but I have handled it in this fashion for a reason, and I hope that it's helpful rather than making the matter mmore complicated.

The Second District Appellate Court has in several cases, for judicial economy and expeditiousness

of proceeding, has sent cases back for the pu.poses of a limited hearing.

I've had one that I've received in which the Court was ordered to proceed with a motion to suppress in DuPage County, that the motion had in Cook County had not been sufficient, and this Court should proceed with a hearing on a motion to suppress, and the instructions of the Appellate Court were that if the Court ruled that the statement should not be suppressed, it should again reinstate the judgment of conviction, and the sentencing order, and if the Court after hearing decided that the motion should be granted, the defendant should be accorded a new trial.

So, it seems to me for the sake of judicial economy, we have had a

whole trial. We have gone through the whole thing. I don't feel that there was any error

C 491

whatsoever in this trial that would be reversible error, aside from the testimony of what statements the defendant made, and may I point out to you, that it is also my view that the father's bringing the gun to the defendant's attention should not be suppressed. He was not the defendant, and it was not an illegal detention under People versus Townes.

So, my ruling goes only to the suppression of the defendant's statements himself, and the State certainly has a right to appeal my ruling. The effect of my order is that I am granting the defendant's motion to suppress his statements on the

grounds that I have just stated.

The State is entitled to proceed and file a notice of appeal and appeal it, and it is my view that if the State prevails in the appeal, that I am hopeful that the Appellate Court will sent it back and say that the judgment of conviction shall be reinstated and that the sentence should be reinstated, and then, the matter could proceed to an appeal by the defendant, if the defendant chose to appeal.

I also do this in the interest of the Second Count which is pending, and the trial date has not been set on that charge that arose in Elmhurst, Illinois,

C 492

and if the State wants time to consider it, I would be glad to have you

consider it, but I certainly think you have an absolute right to appeal my ruling before you try that case so that you know how you decide to proceed because I think the same issue is involved in the Elmhurst case as is involved in this case.

MR. FREEMAN: Identical, your honor.

THE COURT: Same motion.

MR. FREEMAN: It would be the same facts.

THE COURT: Okay.

MR. FREEMAN: Your Honor, the People then will take advantage of your Honor's suggestion, and it is the People's intent to file a certificate of impairment with this Court and ask that this Court certify the matter to the Appellate Court. We would ask that Count II, captioned 82 CF 1000-02, just be held in abeyance pending the decision of the Appellate Court,

Being a pre-trial motion, suppression of evidence, that is a confession, which is of course rather important in the prosecution of any case.

THE COURT: Do you have any dispute with that Mrs. Anagnost?

MS. ANAGNOST: No, I do not. The only thing that I would ask the Court is to, of course, have the defendant

C 493

remain on bail, the amount that has been posted, or on his own recognizance preferably.

THE COURT: Well, I'll let the bond stand. I think that would be suitable.

MS. ANAGNOST: Fine.

THE COURT: And I am very agreeable to deferring the trial on the Elmhurst charge until the matter is resolved in the course of the appeal.

MS. ANAGNOST: Fine.

THE COURT: I think that is suitable.

MS. ANAGNOST: Fine.

THE COURT: But I will certify, you know if you want me to certify, I'll do that, but let me point out, that my purpose in handling it this way is that we have been through an entire proceeding. We've gone through a pre-trial hearing on the motion to suppress. We have gone through a trial. We've gone through a sentencing hearing. There's a judgment of conviction. There's a sentence.

Now, I am vacating everything, and I am going back to the ruling on the motion to suppress, and I am reversing that ruling, and I am granting the motion to suppress. So, it seems to me that all that is

here is a ruling on the motion to suppress, but I'll do it

C 494

whatever way you like.

MR. FREEMAN: Well, your Honor, I think the statute calls for the People to file a certificate of impairment prior --

THE COURT: I beg your pardon.

MR. FREEMAN: -- in any proceeding.

THE COURT: Okay, I beg your pardon.

MR. FREEMAN: At this state now you have placed us in the posture of a pre-trial appeal.

THE COURT: Correct.

MR. FREEMAN: Right, and so in that particular case the appellate procedure is for the People to file a certificate at the request of the Court. That's why I make the request.

THE COURT: I am sorry. All right. I

had something else in mind. Yes, I will be glad to do that.

MR. FREEMAN: This certificat[illegible] not the other certificate.

THE COURT: I don't want to deprive you of your right to appeal. It is a serious matter. It is a close question, frankly, and I resolved it on the ground that the burden of proof, it's a close question.

MR. FREEMAN: Do you want a check date?

THE COURT: I don't have an order vacating a

C 495

judgment of conviction and sentence presumably, so that we can confer on what remains when it is ready. I will be glad to give you a check date.

MR. FREEMAN: The judgment of conviction is vacated for reasons stated on the

record?

THE COURT: That would be the best way.

(WHICH concluded the hearing of the above-entitled cause at the time and date hereinabove set forth.)

No. 83-507

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the 18th Judicial
Plaintiff-Appellant,	)	Circuit
-vs-	)	DuPage County, Illinois
BEN TOM JONES,	)	
	)	PUBL. IN FULL
Defendant-Appellee.	)	

JUSTICE REINHARD delivered the opinion of the court:

Defendant, Ben Tom Jones, was found quilty in a jury trial of armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 18-2 (a)). His motion for a new trial was denied except the court reserved its ruling on defendant's contention that the court previously had erred in denying his pretrial motions to suppress his confession. After sentencing the defendant to a term of imprisonment of six years plus 180 days,

the trial court immediately thereafter vacated the sentence and judgment of conviction, granted a new trial, and granted the defendant's pretrial motions to suppress his confession. The State filed a certificate of impairment, and appeals pursuant to Supreme Court Rule 604(a)(1) from that portion of the order suppressing defendant's confession.

The issue raised on appeal by the State is whether the trial court's determination that defendant had not knowingly and intelligently waived his right to counsel during a police interview was against the manifest weight of the evidence.

The procedure posture in which we receive this case is somewhat unusual. For purposes of this appeal it is necessary to relate only the proceedings on the motion to suppress defendant's confession

and certain portions of the trial evidence as most of the trial evidence is not essential for review purposes in view of the trial court's vacation of the judgment of conviction and grant of a new trial.

Defendant's several pretrial motions to suppress his confession alleged, inter alia, that prior to his interrogation he had not been given the Miranda warnings, and that he had invoked his right to counsel but the police nevertheless interrogated him without obtaining a waiver of his right to counsel. At a hearing on these pre-trial motions, the following testimony relevant to the issue on appeal was adduced.

Thomas E. Vosburgh, a detective with the Du Page County Sheriff's Office, testified that Ben Jones brought his son, defendant Ben Tom Jones, to the

sheriff's office in response to a prior telephone call in which, he, Vosburgh, wanted to talk with defendant about an armed robbery in Woodridge. The three went to an interview room and Vosburgh read defendant the Miranda warnings verbatim from a card. Defendant said he understood each right and agreed to answer the questions. He did not ask for a lawyer at any time and did not refuse to answer any questions. The questioning took about 40 minutes. Vosburgh determined defendant was not involved in that armed robbery, and then advised defendant that other officers wished to talk with him. After introducing defendant and his father to Detective Herb Hogberg from the Elmhurst Police Department and to Detective James Romani from the Oakbrook Police Department, he went to his office and did not participate in any further questioning of defendant.

He had not informed defendant's father previously that other officers would question defendant about other offenses.

Detective Hogberg testified that he advised defendant from memory that he had a right to remain silent and a right to an attorney during any questioning, that anything he said could be used against him in a court of law, that if he could not afford an attorney, one would be appointed by the court but couldn't be appointed that night --"at a later date if he was ever charged with anything." He never specifically told defendant he could have an attorney during this particular interrogation. Defendant either nodded his head or stated he understood after each statement and at the end. Defendant's father also said he understood as he was a police officer in Bellwood. Only Romani, defendant

and his father, and Hogberg were there throughout the questioning. Hogberg advised defendant he was investigating an armed robbery in Elmhurst. At first defendant denied knowledge of the incident, but then gave incriminating statements. At no time did defendant ask for a lawyer or indicate he wished the questioning to stop. After the incriminating statements were made by defendant, his father asked whether he should get an attorney and Hogberg said it was up to him. Later the father said he had better get an attorney and the questioning ceased.

Detective Romani testified, in pertinent part, that Hogberg advised defendant of his rights before questioning him, maybe from a card, but he was not certain, and that defendant acknowledged orally that he understood the rights and never asked for an attorney.

Defendant's father had once inquired whether he should get an attorney and was told that was his decision. Later, defendant's father said he should get an attorney and the questioning stopped. The interview took approximately 30 minutes. Defendant did not execute a written waiver of his rights.

Defendant's father testified that he was a part-time policeman, that during the first questioning by Vosburgh defendant was not advised of his rights until defendant said "Hold it, we wants a lawyer." Then Vosburgh told defendant of his right to remain silent and that anything he said could be used against him. Vosburgh did not recite from a card. He son denied involvement, and was then questioned by the other two detectives. He told them that they were not answering any questions and they wanted a lawyer.

The officers just went on talking and his son then made statements. Defendant himself did not testify at the hearing.

The trial court denied the motion to suppress the confession stating that it was difficult to resolve the conflicting testimony, but did so on the basis of the "reasonableness of the conflicting stories." The court found Vosburgh accurately admonished defendant from the rights card. However, the trial judge felt Hogberg's explanation of the presence of a lawyer that night might have been misleading, and his difficulty in recalling gave her trouble. She concluded that the State had met its burden on the issue because of Vosburgh's credible testimony regarding his reading of the rights and Romani's testimony that Hogberg also gave the rights accurately.

At trial, Hogberg's testimony pertinent to his questioning of defendant was that he orally advised defendant of his rights, that defendant nodded or said he understood after each right was explained, and although he did not specifically tell defendant he had a right to an attorney during that particular questioning, he thought defendant understood he had the right to an attorney during any questioning. He did not give defendant a rights waiver form to sign. Romani gave testimony similar to that at the pretrial hearing regarding Hoberg's advising defendant of his Miranda rights. To his recollection the defendant responded at the summation of the admonitions. He didn't recall Hogberg telling defendant he had a right to have an attorney present for that particular interrogation or that defendant could stop any time and refuse to

answer and request an attorney.

After the defendant had been found guilty by the jury and immediately following her sentencing of the defendant, the trial judge vacated the sentence and judgment, granted a new trial, and suppressed the confession. As we can best summarize, the trial judge remarked that she had not ruled on the credibility of the witnesses at the pretrial hearing, that she was not doing so now, and she was reassessing her ruling on the "reasonableness" of what happened. The judge stated that "[t]he narrow ground of my ruling is not that the defendant wasn't warned, but that I do not believe there is the requisite showing that he knowingly and intelligently waived his right to counsel. It is the single issue of my ruling." Nevertheless, the judge went on to remark that although the pretrial hearing testimony of Romani

convinced her that the State had met its burden, there was some difference in the trial testimony concerning whether Hogberg paused after each Miranda warning, and she now felt the State had not met its burden to show a knowing and intelligent waiver of defendant's right to counsel.

We first note that although the issue is not before us on appeal, there was some question raised below whether defendant was in custody during the second questioning when he gave the confession. The court below found defendant was not free to leave and, considering this record and the State's failure to seek review of this question, we do not consider the point further.

The relevant inquiry before us is whether the defendant knowingly and intelligently waived his fifth amendment rights and, in particular, his right to counsel. Certain well-established principles are involved. The State bears the burden of

demonstrating that a defendant has been warned of his constitutional rights under the fifth amendment and has waived them. (People v. Hebein (1982), 111 Ill. App. 3d 830, 845, 444 NE 2d 782). The trial court must initially determine these questions and, in making its decision, the court does not have to be convinced beyond a reasonable doubt; its findings will not be disturbed unless they are against the manifest weight of the evidence. (People v. Martin(1984), 102 Ill. 2d 412, 426, 466 NE 2d 228). In order to establish a valid waiver of the right to counsel, the State must prove an intentional relinquishment or abandonment of a known right or privilege. (People v. Aldridge (1980), 79 Ill. 2d 87, 93, 402 NE 2d 176). The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances

surrounding that case, including the background, experience, and conduct of the accused. People v. Martin (1984), 102 Ill. 2d 412, 425, 466 NE 2d 228.

The trial court expressly found at the time of the hearing on the motion to suppress and later at the new trial motion hearing, that defendant was given his Miranda warnings. The record supports this conclusion. Hogberg's explanation to defendant that if defendant could not afford an attorney one would be appointed for him by the court, but at a later date if he was ever charged, was not entirely accurate. However, neither defendant nor his father testified that defendant was misled by the erroneous reference to appointed counsel if he was ever charged or that the warning was explained in this fashion. Moreover, Romani did not testify that this misstatement was made by Hogberg when advising defendant of his rights.

In fact he testified that Hogberg told defendant an attorney would be appointed by the court to represent him, if he wished, and told defendant he would exercise his rights at any time and not answer any questions. Nor did Hogberg use the inaccurate phraseology when testifying on cross-examination at the pretrial hearing and at the trial as to his explanation of the Miranda warnings. Any deficiency in this respect has not been established in this record. Accordingly, we focus on whether the defendant knowingly and intelligently waived his right to counsel.

The unusual circumstances present in this record are that the trial court originally ruled, after a pretrial hearing on defendant's motion to suppress his confession, that the State had met its burden on both the admonition of rights and a waiver thereof. At the hearing

on defendant's post-trial motion for a new trial, the trial court, however, granted a new trial and suppressed the confession finding there were certain discrepancies raised in the trial testimony which persuaded it that the State had not met its burden on the waiver of counsel issue only.

Generally, relitigation in the form of another hearing of a prior order denying a pretrial motion to suppress should not be conducted in the absence of additional evidence or peculiar circumstances. (See People v. Armstrong (1973), 56 Ill. 2d 159, 161, 306 NE 2d 14; People v. Hopkins (1972), 52 Ill. 2d 1, 4, 284 NE 2d 283; People v. Coleman (1981), 100 Ill. App. 3d 306, 310-11, 426 NE 2d 1124). While here, no new motion to suppress was made during trial based upon additional evidence or unusual circumstances, the trial court did consider the trial testimony in re-assessing its initial decision on the

motion to suppress during the proceedings on defendant's post-trial motion for a new trial. A pretrial ruling on suppression is not final and may be changed or reversed at any time prior to final judgment. (People v. Caballero (1984), 102 Ill. 2d 23, 35-36, 464 NE 2d 223). The function of a pretrial hearing on a motion to suppress a confession is specifically to conduct an evidentiary hearing into the merits of the motion and for a determination based upon the facts adduced. However, once this motion is decided at that hearing, the focus of the trial testimony is not directed to a reestablishment of the issues previously resolved at the pretrial hearing not is there any requirement to do so.

The trial court apparently thought that detective Romani's trial testimony, that he didn't "recall him [Hogberg] stop-

ping after" each warning, was a significant departure from the pretrial hearing testimony to conclude that the State had not met its burden to show a knowing and intelligent waiver of counsel. Hogberg had testified at the pretrial hearing that defendant nodded his head or stated he understood after each right was given him and at the end. Romani testified at the pretrial hearing that defendant said he "acknowledged understanding them", but was never asked by the State or defendant when defendant acknowledged the understanding of the rights. We do not find consideration of Romani's trial testimony warranted the trial court's ultimate suppression of the confession on the specific basis that defendant did not make a knowing and intelligent waiver of his right to counsel, and the finding was against the manifest weight of the evidence.

As we stated earlier, the trial court expressly found at the time of its ultimate ruling suppressing the confession that defendant had been given the Miranda warnings. On the waiver issue, the trial judge expressly stated she was not making a credibility assessment even though the officers' testimony and the defendant's father's testimony was directly contradictory on whether defendant waived his right to an attorney. Instead, the court phrased its conclusions in terms of "reasonableness of what happened". While the court below should have made a more specific finding on the credibility of the witnesses under the circumstances here to facilitate appellate review, we shall presume that the trial court credited only the testimony that supports its ruling. (See People v. Winters (1983), 97 Ill. 2d 151, 158, 454 NE 2d 299). In this regard we shall therefore assume that the court

below felt that Officer Hogberg's testimony, that he paused after each warning was read to the defendant and defendant acknowledged those rights, was not credible, and in view of this failure to obtain an acknowledgement after each warning, defendant did not knowingly and intelligently waive his right to counsel.

Miranda does not specify the precise manner and language to be used in advising a defendant of his constitutional rights. It requires not a ritualistic recital of words, but an intelligent conveyance of the rights to remain silent and of the general right of counsel. (People v. Merrero (1984), 121 Ill. App. 3d 716, 722, 459 NE 2d 1158). We believe that the failure to pause after the reading of each right and to receive an acknowledgement of understanding and waiver of that right before proceedings with admonition of the next right is not required

in order to effectuate a knowing and intelligent waiver. When an individual has been admonished of his rights and indicates that he understands them, his giving of a statement without requesting a lawyer is evidence that he chooses to waive a known right. People v. Martin (1984), 102 Ill. 2d 412, 425, 466 NE 2d 228; People v. Brooks (1972), 51 Ill. 2d 156, 164, 281 NE 2d 326.

Here, the defendant was first given his Miranda warnings by Officer Vosburgh and, according to Vosburg, defendant said he understood them and agreed to talk with him. Defendant did not refuse to answer any questions or request a lawyer at any time. Although the defendant's father contradicted this testimony by testifying that defendant asked for a lawyer and was not advised of his rights prior to the questioning, the trial court

specifically found Vosburgh gave the required warnings. The court never stated whether defendant knowingly and intelligently waived his rights to Vosburgh--perhaps because no incriminating statement was made to Vosburgh on the unrelated armed robbery for which he was being questioned. There is no reason not to conclude that the trial court, when it originally denied the motion to suppress, found that defendant had waived his rights to Vosburgh. Moreover, there is nothing that the court below said, when it reversed itself and did suppress the confession, that relates to Vosburgh's testimony. Thus, we conclude defendant was advised of his rights by Vosburgh and knowingly and intelligently waived them.

It was been held that once Miranda's mandate has been complied with at the threshold of the questioning, it is not

necessary to repeat the warnings at the beginning of each successive interview conducted close in time to the original warnings. (People v. Hill (1968), 39 Ill. 2d 125, 131-32, 233 NE 2d 367; People v. Beamer (1978), 59 Ill. App. 3d 855, 858, 376 NE 2d 368.) Although the second questioning, which immediately followed, by Hogberg and Romani, who were not with the same law enforcement agency as Vosburgh, concerned separate crimes, courts have generally taken the position that new warnings are not required just because there has been a change in the locale of the interrogation, in the officers doing the questioning, or in the subject matter of the investigation. (See 1 W. LaFave & J. Israel, Criminal Procedure §6.8, at 520 (1984).) Under the circumstances present here, we find that the warnings given and the waiver of the rights

at the initial questioning by Vosburgh were an adequate protection of defendant's fifth amendment right as applied to the immediate, subsequent questioning by Hogberg and Romani.

Even without considering Vosburgh's warnings, we conclude from this record that there has been a knowing and intelligent waiver of the right to counsel. The trial court consistently found defendant was correctly given the Miranda warnings at the second interview with Hogberg and Romani. Defendant, according to Hogberg and Romani, said he understood his rights and gave a statement without requesting a lawyer. The trial court appeared to suppress the confession only on the basis of trial testimony which, as previously discussed, was that there was no pause between the warnings for defendant to then respond rather than

at the end of the admonitions. Although we place great weight on the findings of fact by the trial court, for all the foregoing reasons, the order suppressing the evidence was manifestly erroneous. See People v. Winters (1983), 97 Ill. 2d 151, 163, 454 NE 2d 299.

The trial court's order to suppress the confession after granting a new trial was manifestly erroneous requiring reversal and remandment. However, we are compelled to further comment on the trial court's erroneous assumption, made at the time it vacated the sentence and conviction, that "if the State prevails in the appeal, * * * I am hopeful that the Appellate Court will send it back and say that the judgment of conviction shall be reinstated and that the sentence should be reinstated." While a reviewing court may in proper circumstances upon

a defendant's appeal of his conviction vacate the judgment and remand for a redetermination of facts not originally considered or found by the trial court in a pretrial hearing to suppress and direct reinstatement of the conviction following that hearing if suppression is denied (see People v. Simmons (1975), 60 Ill. 2d 173, 181-82, 326 NE 2d 383; People v. Lane (1982), 106 Ill. App. 3d 793, 798, 436 NE 2d 704), there is no authority for the trial court to vacate a judgment of conviction and grant a new trial, and upon the reviewing court's reversal of its granting of a motion to suppress, to reinstate the original judgment of conviction and sentence. Nor does a reviewing court have authority to issue such directions to a trial court. (See Supreme Court Rule 615(b) (87 Ill. 2d R. 615(b).). In view of the trial

court's action, the suppression order is reversed,and the cause remanded for a new trial.

REVERSED and REMANDED.

NASH and HOPF, JJ., concur.

61470

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

April 2, 1985

Ms. Catherine Anagnost
Anagnost & Anagnost
111 S. LaSalle St.
Chicago, IL 60603

No. 61470 - People State of Illinois, respondent, v. Ben Tom Jones, Petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 23, 1985.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

A F F I D A V I T

CATHERINE C. ANAGNOST, being first duly sworn on oath deposes and says that:

1. Affiant is a member of the bar of the Supreme Court of the United States and the attorney for Ben Tom Jones, petitioner in the above-captioned matter.

2. Affiant had been in charge of representing the petitioner throughout the trial and the appellate proceedings.

3. The Judgment of the Appellate Court was filed on December 20, 1984 and the Petition for Leave to Appeal to the Supreme Court of Illinois was denied on April 2, 1985. Pursuant to Rule 20 of the Supreme Court of the United States, a Petition for Certiorari would have been due by May 2, 1985.

4. Affiant had commenced the preparation of the Petition for Certiorari but, was unable to complete it by its due date, or ask for an extension of time within which to file it, for the reasons described in the medical certificate attached hereto and made a part hereof, which conditions were acute until after the due date and have persisted.

5. This Affidavit is made in support of petitioner Ben Tom Jones' Petition for Certiorari to review the affirmance of his conviction by the Appellate Court of Illinois for the Second Judicial District.

6. Further Affiant saith not.

_____
Catherine C. Anagnost

SUBSCRIBED AND SWORN TO
before me this 26th day
of November, 1985.

_____
Notary Public

C E R T I F I C A T E

TO WHOM IT MAY CONCERN:

This is to certify that Catherine Anagnost was unable to attend to her professional activities on account of sudden unforeseen illness in the middle of April, 1985.

The initial diagnosis was fever of undetermined origin with temperature elevations to 103 degrees Fahrenheit. Acute and convalescent viral titres are currently pending for respiratory and central nervous system virus'. Subsequent to this initial phase, she developed an exacerbation of acute asthma with acute respiratory distress necessitating institution of a course of high dose Methylprednisolone which is currently being slowly tapered in addition of aminophylline, Ipratropium bromide aerosol, albuterol inhaler, albuterol tablets. During this respiratory

illness and exacerbation of acute asthma, there was repeated hemoptysis. Sputum cultures show staphylococcus aureus and aspergilla (species pending) in addition to alpha streptococcus. As the results of blood chemistries including IG E level, aspergillus precipitant titre, total eosinophil count are not yet available, the possibility of allergic bronchopulmonary aspergillosis cannot be excluded.

She was completely disabled until the middle of May, 1985 and, thereafter, her disabling symptoms have recurred frequently and intermittently to the date of this certificate.

The present diagnosis is fever of undetermined origin, hemoptysis, acute asthma with acute respiratory failure precipitated by possibly respiratory infection either viral, bacterial (staphylococcus

aureus) or aspergillosis or allergic bronchopulmonary aspergillosis.

DATED: November 26, 1985.

MARIA A. ANAGNOST, M.D.
F.A.C.S.
1545 North Clinton Place
River Forest, IL 60305